Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Michigan	CC Docket No. 97-137

To: The Commission

REPLY OF BELLSOUTH CORPORATION IN SUPPORT OF ITS PETITION FOR RECONSIDERATION AND CLARIFICATION

AT&T, the Association for Local Telecommunications Services ("ALTS"), Bell Atlantic, the Competition Policy Institute ("CPI"),[1] MCI, and Sprint have filed responses to BellSouth's Petition for Reconsideration and Clarification. Whether filed in support of the petition or in opposition to it, these responses serve to highlight the need for the Commission to revisit its Memorandum Opinion and Order ("Order"). They demonstrate that the Order's "guidance" is already being read by different parties in different ways, including ways that are flatly contrary to the requirements of section 271. The Commission should clarify, and in some cases reconsider, its Order to ensure consistency with the Act.

[1] Despite a name chosen to evoke non-partisan fidelity to the public interest, CPI was created by the incumbent long distance carriers and receives virtually all of its funding from AT&T, MCI, the Telecommunications Resellers Association, and the National Cable Television Association. See Hearing Testimony of Ronald J. Binz, In the Matter of the Joint Application of Pacific Telesis Group and SBC Communications Inc., Application 96-04-038 (Cal. PUC Nov. 19, 1996), an excerpt of which is attached hereto as Exhibit "A." CPI has never received "any funding from actual consumers," id. at 2612-15, and its policy positions reflect "input from its corporate sponsors . . . [AT&T and MCI]," id. at 2624, 2626.

I. THE COMMISSION MAY NOT EXTEND THE CHECKLIST REQUIREMENT OF NONDISCRIMINATORY ACCESS TO OSSs

A. The Act Requires Only Nondiscriminatory Access

In its petition, BellSouth requested that the Commission clarify that a BOC's duty to provide nondiscriminatory access to its operations support systems ("OSSs") does not impose any additional requirements regarding the timeliness or quality of the underlying local facilities or services that competitive local exchange carriers ("CLECs") obtain by using OSSs. While BOCs are obligated to afford nondiscriminatory access to their OSSs under the checklist requirements of section 271(c)(2)(B), they are not thereby obligated to provide other checklist items in a manner the Commission or CLECs deem competitively desirable.

According to AT&T, BellSouth's position that nondiscriminatory access to OSSs may not be equated with access to the underlying network facilities and services "reflects a fundamental misunderstanding of the nature of CLEC orders, particularly orders for resold services and for existing combinations of unbundled network elements." AT&T Response at 6-7. AT&T suggests that its own desire to enter the local market by purchasing a so-called "platform" of pre-combined elements (or through resale where that is cheaper), instead of taking network elements on an unbundled basis or constructing network facilities of its own, should define the BOCs' OSS obligations under the Act. Id. at 7. But it is AT&T, and not BellSouth, that "misses the point." Id. at 6.

Most important, the Act simply does not require the BOCs to combine unbundled network elements for CLECs, as AT&T believes. As the Eighth Circuit recently confirmed, section 251(c)(3) "unambiguously indicates that requesting carriers will combine the unbundled

elements themselves." Order on Petitions for Rehearing at 2, Iowa Utils. Bd. v. FCC, No. 96-3321 (8th Cir. Oct. 14, 1997). The Eighth Circuit further explained, in a direct rebuff to AT&T's claim of an entitlement to "existing combinations of unbundled network elements," that section 251(c)(3) "does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements . . . in order to offer competitive telecommunications services." Id. Given that AT&T has no entitlement to the "platform" under section 251, satisfaction of the Act's OSS requirements can hardly be measured by assessing a BOC's response to such a request.

AT&T also vaguely asserts that an amalgamation of OSS access with access to other checklist items is necessary to prevent the BOCs from "masking discrimination." AT&T Response at 7. AT&T fails to explain how a demonstration of nondiscriminatory access to OSS functions could possibly mask discrimination. If a BOC can show that CLECs are able to perform traditional OSS functions in substantially the same time and manner as the BOC itself, discrimination with respect to this checklist item cannot be masked because it does not exist.[2]

While AT&T further claims that "[a]nything less than [an] end-to-end assessment" of OSS access will "obscur[e] an absence of competition," AT&T Response at 7, this merely reveals how far AT&T (and its interpretation of the Order) stray from the Act. As this Commission recognized elsewhere in the Order, the checklist is not a test for the existence of

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[2] See First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, 15764 ¶ 518 (holding that CLECs must be able to "perform the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing for network elements and resale services in substantially the same time and manner that an incumbent can for itself."), modified on reconsideration, 11 FCC Rcd 13042 (1996), vacated in part on other grounds, Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997).

local competition, but rather measures whether the BOC makes available items that will facilitate competitive entry when CLECs decide the time is right. Order ¶¶ 113-115. OSS access may not be used as a proxy for the "metric" tests of local competition that Congress rejected. See id. ¶¶ 74-77.

Like AT&T, ALTS believes the Commission can properly require the BOCs to submit evidence of "end-to-end" performance in furnishing other checklist items and then "back out" irrelevant factors to arrive at a measure of OSS performance. ALTS Response at 10-11. While ALTS claims that this approach "makes far more sense" than using direct evidence of nondiscriminatory OSS access to satisfy this checklist requirement, id. at 11, it is difficult to imagine a more unwieldy or error-prone approach. Moreover, ALTS's approach can be read as making actual orders for checklist items a prerequisite to compliance with section 271, which the Commission has already rejected. See Order ¶¶ 110-111.

B. Section 271 Approval May Not Be Premised on Satisfaction of Specific OSS Performance Standards

AT&T says it is unnecessary for the Commission to clarify that section 271 authorization will not be made contingent upon a BOC's satisfaction, or commitment to satisfy, performance standards for OSSs beyond nondiscriminatory access. AT&T Response at 9. AT&T, however, wants it both ways. AT&T claims that the Order does not "suggest[] that an RBOC's failure to include such [performance] standards in the interconnection agreement will defeat a section 271 application," even while it contends that, under the Order, the Commission may look to interconnection agreements and other sources "to determine appropriate performance standards." AT&T Response at 10. MCI chimes in with its own assertion that "the Commission has every

right to demand that BOCs provide adequate performance standards as a precondition to long-distance entry." MCI Response at 8. These contrary claims prove the need for an unambiguous statement by the Commission that adoption of specific performance standards for OSSs will not be required.

II. SECTION 272 COMPLIANCE IS NOT REQUIRED PRIOR TO SECTION 271 AUTHORIZATION

AT&T defends the Order's intimation that, under section 271(d)(3)(B), a BOC cannot offer in-region interLATA service unless its long distance company has been "up and running" as a section 272 affiliate. AT&T Response at 17 n.13; see Order ¶ 371. Yet the Act simply cannot be read to require a BOC to create and operate a section 272 affiliate to sell in-region, interLATA services before the BOC even has such services to sell. Such a charade would violate not only common sense (by imposing regulatory burdens when there is no risk of discrimination or a cross-subsidy), but also the plain language of the statute.

AT&T makes no effort to reconcile its view with the actual language of section 271(d)(3)(B), which requires the BOC applicant to show that "the requested authorization will be carried out in accordance with the requirements of section 272" (emphasis added). This subsection is the only subsection of section 271(d)(3) to employ the future tense. Section 271(d)(3)(A) requires a finding that the BOC "has met the requirements of subsection (c)(1)," 47 U.S.C. § 271(d)(3)(A) (emphasis added), while section 271(d)(3)(C) calls for a determination that "the requested authorization is consistent with the public interest, convenience, and necessity." 47 U.S.C. § 271(d)(3)(C) (emphasis added). Congress' careful use of the future

tense in section 271(d)(3)(B) leaves no doubt that a BOC does not have to operate in accordance with section 272 in advance of receiving section 271 authorization.

III. THE COMMISSION ERRED IN ASSESSING AMERITECH'S MARKETING SCRIPT

In its Non-Accounting Safeguards Order, the Commission concluded that a BOC can meet its equal access obligations, while also engaging in joint marketing authorized under section 272(g), by "inform[ing] new local exchange customers of their right to select the interLATA carrier of their choice and tak[ing] the customer's order for the interLATA carrier the customer selects."[3] In its Order, however, the Commission suggests that it might reject a future application by Ameritech because Ameritech proposes to do exactly what is permitted by Non-Accounting Safeguards Order. Order at ¶ 376. BellSouth has asked that this portion of the Order be reconsidered and made consistent with the Commission's position in the Non-Accounting Safeguards Order.

While MCI asserts that the Non-Accounting Safeguards Order "clearly requires the listing of IXCs in random order before marketing the § 272 affiliate," MCI Response, at 5 n.2, this is just not so. See also AT&T Response at 18. The Non-Accounting Safeguards Order holds that in order for a BOC to engage in joint marketing, the BOC must "inform" customers of their right to choose a long distance carrier. 11 FCC Rcd at 22046, ¶ at 292. A BOC does not have to force a customer to listen to a random list of long distance carriers in which the customer may have no

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[3] First Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, 11 FCC Rcd 21905, 22046 ¶ 292 (1996), recon. 12 FCC Rcd 2297 (1997), further recon. 12 FCC Rcd 8653 (1997), pet'n for review pending sub nom. Bell Atlantic Tel. Cos. v. FCC, No. 97-1432 (D.C. Cir. filed July 11, 1997).

interest. To the contrary, in the Non-Accounting Safeguards Order the Commission embraced a BOC marketing plan under which customers would be informed of their right to select an interLATA carrier of their choice but would be read a list of long distance carriers only if they chose this option. See BellSouth Petition at 8.

Unlike MCI and AT&T, Sprint at least admits that its approach would nullify a BOC's statutory right to engage in joint marketing for inbound calls. Sprint Response at 19 n.39. Nevertheless, Sprint attempts to defend its position by breezily stating that a BOC may exercise its joint marketing rights in "other aspects of marketing." Id. Section 272(g) does not carve-out inbound calls from a BOC's right to engage in joint marketing. The section authorizes joint marketing in both inbound and outbound calls, which simply cannot be reconciled with the "random list" approach.

Not only was the "random list" approach rejected by the Commission in the Non-Accounting Safeguards Order, and not only does the approach violate a BOC's statutory right, but it would impose a tremendous burden on the BOCs and their customers. As Bell Atlantic has pointed out, in some markets there are well over 100 carriers offering long distance service. Bell Atlantic Response at 2. Ordering a BOC to use the "random list" approach in all cases would force the BOCs to hire additional customer service representatives and subject customers to a recitation of long distance carriers that may take over eight minutes to complete. Id. AT&T, MCI, and Sprint do not even attempt to argue that this would benefit consumers or be fair to all carriers. The customer would beg for a stop to the recitation by naming a long distance carrier with which he or she has become familiar through thirteen years of interexchange carrier marketing. Almost always, of course, that familiar carrier would be one of the very incumbents

who argue for the random list rule: AT&T, MCI, and Sprint. Not only would BOCs be denied their right to joint market, but also they would be systematically disadvantaged in comparison to the Big Three long distance carriers.

IV. THE COMMISSION MAY NOT USE THE PUBLIC INTEREST TEST TO EXPAND THE CHECKLIST

In the midst of section 271's intricate and sometimes arcane language, section 271(d)(4) stands apart. It bluntly states: "The Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B)." There are no exceptions. Indeed, AT&T, ALTS, CPI, MCI, and Sprint all are forced to agree with BellSouth that the Commission may not extend the checklist through the public interest test. In the face of this unassailable fact, the parties who oppose BellSouth's petition are placed in the difficult position of having to defend language in the Order that does just what is concededly forbidden.

In an attempt to avoid this problem, CPI and Sprint engage in a semantic dodge; they claim that the Commission may consider public interest factors that are not included in the competitive checklist, provided that these factors are not "elevate[d]" into a "necessary precondition," CPI Response, at 10, but are only treated as factors "that may be relevant." Sprint Response, at 16. However, to consider additional factors is by the very meaning of those words to take additional factors into account, and to take additional factors into account is to expand the competitive checklist, in violation of section 271(d)(4). Merely calling additions to the checklist "considerations" does not change this fact.

Well-settled law bears out the observation of the Senate Commerce Committee's Chairman that "[t]he FCC's public-interest review is constrained by the statute" because "the

FCC is specifically prohibited from limiting or extending the terms used in the competitive checklist." 141 Cong. Rec. S7942, S7967 (daily ed. June 8, 1995) (statement of Sen. Pressler). However broad the Commission's public interest authority may be in other contexts, section 271(d)(4) limits the Commission's power in considering the BOC's steps to open the local market to those factors found in the competitive checklist. Because "agency discretion is defined by and circumscribed by law," the Commission's discretion could not under any circumstances "encompass the authority to contravene statutory commands." Farmworker Justice Fund, Inc. v. Brock, 811 F.2d 613, 622 (D.C. Cir.), vacated on other grounds, 817 F.2d 890 (D.C. Cir. 1987).

This is true whether the Commission establishes absolute, quasi-checklist criteria or simply adopts additional local market "considerations." When determining whether an agency decision is arbitrary and capricious, courts consider "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). Accordingly, "an agency rule would be arbitrary and capricious if the agency had relied on factors which Congress has not intended it to consider . . . ." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); see also Board of County Comm'rs v. Isaac, 18 F.3d 1492, 1497 (10th Cir. 1994) ("An agency acted arbitrarily and capriciously if it relied on factors deemed irrelevant by Congress . . . .").

The revived "pick and choose" rule, defended by AT&T as "simply one factor in [the Commission's] public interest analysis," is a good example of an impermissible consideration. AT&T Response at 15-16. Far from being a "relevant factor" for the Commission to consider under the Act, 401 U.S. at 416, the Commission's attempt to force compliance with this rule has

been struck down by the Eighth Circuit as an "unreasonable construction of the Act." Iowa Utils. Bd., 120 F.3d at 801. It does not become any more reasonable when foisted on the BOCs under the supposed catch-all authority of the public interest test, particularly where doing so would effectively trump the more limited "pick and choose" provision deemed appropriate by Congress. See 47 U.S.C. § 252(i).

CONCLUSION

To bring the Order into conformance with the Act, BellSouth's petition should be granted.

Respectfully submitted,

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October 20, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE

STATE OF CALIFORNIA

ADMINISTRATIVE LAW JUDGE KIM MALCOLM and
ADMINISTRATIVE LAW JUDGE JANET A. ECONOME, presiding.
In Attendance: JOSIAH L. NEEPER, COMMISSIONER

In the Matter of the Joint Application of Pacific Telesis Group ("Telesis") and SBC Communications Inc. ("SBC") for SBC to control Pacific Bell (U 1001 C), Which Will Occur Indirectly as a Result of Telesis' Merger With a Wholly Owned Subsidiary of SBC, SBC Communications (NV) Inc.	Application 96-04-038

REPORTER'S TRANSCRIPT

San Francisco, California
November 19, 1996
Pages 2609 - 2801
Volume 21

Reported by: Lynn A. Stanghellini, CSR 3489
William J. Harter, CSR 3532
Deanna M. Zachlod, CSR 3251

PUBLIC UTILITIES COMMISSION, STATE OF CALIFORNIA
505 Van Ness Avenue, San Francisco, California 94102

A That's correct.

Q Have you ever had any antitrust economics articles published in any professional journals?

A No, I have not.

Q You are president and policy director of the Competition Policy Institute; is that correct?

A That's right.

Q Is it okay if I refer to that organization as CPI for simplicity purposes?

A Certainly.

Q On page 1 of your testimony, you describe CPI as an independent nonprofit organization which is a combination consumer group and think tank; is that correct?

A That's right.

Q On page 2 you state that CPI's initial funding was supplied by a broad group of competitive telecommunications carriers but that CPI is independent of those funding sources; is that correct?

A Yes.

Q Isn't it true that CPI received over $500,000 in grants this year from AT&T, MCI, and a number of other long distance companies and associations to start CPI?

A I believe there are currently 15 sponsors to CPI, that's correct.

Q My question was isn't it true that CPI received over $500,000 from your corporate sponsors

AT&T, MCI and a number of other long distance companies and associations?

MR. SHAMES: Your Honor, objection; asked and answered.

ALJ ECONOME: It was asked but I don't think it was answered. So overruled.

THE WITNESS: The $500,000 I believe was response I gave to a reporter who asked me a question about that at the beginning of CPI. That was a ballpark figure that I had given him as the size of the initial setup, yes.

MR. MANCINI: Q MCI alone has provided 108,000 to CPI since January of this year; is that correct?

A I would have to check that.

Q MCI has responded to a document request providing the figure 108,000. If you would like to see it we can provide it to you.

ALJ ECONOME: Are you asking the question subject to check?

MR. MANCINI: Subject to check.

THE WITNESS: Subject to check.

MR. MANCINI: Q Do you recall what AT&T's funding has been to date?

MS. MAZZARELLA: Objection; irrelevant and calls for information protected by AT&T's right of privacy.

ALJ ECONOME: Overruled.

MR. SHAMES: Your Honor, I should like to object in large part because this question was asked of UCAN already in data requests. We objected on the basis of

relevance. We objected on the basis that the information was not probative. The applicants did not respond, did not seek a motion to compel. They did not pursue the discovery any further at that point.

I think they have waived their right to pursue this specific line of questioning.

ALJ ECONOME: That's overruled. I'm sorry. It is relevant to the bias, potential bias or the issue of who funds CPI.

If the witness knows the answer, I think he should answer.

But I want you to -- I don't know with all this if you have the question in mind.

Mr. Mancini, can you repeat your question.

MR. MANCINI: Q Do you recall approximately how much AT&T has provided to CPI this year?

A The figure of $500,000 is approximately correct. I think it was a little bit less than that for this year.

And the relative proportion of the initial sponsors was roughly in proportion to their size as companies. I think AT&T'S share was larger than the MCI share. I don't know the exact number, but it would have been in rough proportion to the market shares, I think.

Again, it is a little difficult to answer because of the sort of timing of funding. These companies are on different funding cycles.

The sponsors subsequent to the initial

sponsors include other companies in other industries. So I don't have information with me about the exact numbers.

Q Have you received any funding from actual consumers besides corporate sponsors?

A No. I don't believe I represented that anywhere.

MR. MANCINI: Your Honor, I would like to introduce two exhibits, if we could go off the record.

ALJ ECONOME: We will be off the record.

(Off the record)

ALJ ECONOME: We will be back on the record.

I will mark for identification as Exhibit 159 a news release with the heading "CPI Competition Policy Institute," dated March 21st, 1996.

(Exhibit No. 159 was marked for identification.)

ALJ ECONOME: Then I will mark as Exhibit 160 a document with the first page having the title "Charter Competition Policy Institute."

(Exhibit No. 160 was marked for identification.)

MR. MANCINI: Q Mr. Binz, do you recognize Exhibit 159, the CPI news release?

A Yes.

Q The second page of this news release indicates that the supporting companies and organizations have all endorsed the institute's charter; is that correct?

Q And one of those sources which provides input on the selection of activities and the determination of your positions is your corporate sponsors; is that correct?

A That's right.

MR. MANCINI: Your Honor, I'd like to introduce a new exhibit, if we can go off record.

ALJ ECONOME: We'll be off record.

(Off the record)

ALJ ECONOME: We'll be back on the record.

I'll mark as Exhibit 161 what looks like a copy of a news article from the Washington times. The date on the page is 6/11/96.

(Exhibit No. 161 was marked for identification.)

MR. MANCINI: Q Mr. Binz, in the second column of this article it has a quote from you, and the article quotes you as stating:

> "'The policy positions [of the CPI] will be decided by the staff of the institute, through research, the advice of consumers and the input of sponsoring organizations.'"

Is that an accurate quote?

MR. SHAMES: Objection, your Honor.

I believe that the question is mischaracterizing this document.

It would appear that this is an editorial of

some sorts, presumably from the Washington Times.

We have not established that in fact Mr. Binz has seen this article or this opinion editorial.

We have not established that in fact it is from the Washington Times.

I believe there is a certain amount of laying a foundation that needs to be gone into before that question is asked.

ALJ ECONOME: If you can lay a brief foundation.

But I will just note for the record that this article does have quote marks around the sentence Mr. Mancini referred.

MR. MANCINI: Q Mr. Binz, do you recognize this editorial which appeared in the Washington Times?

A Yes, I do.

Q In the second column it contains a quote from you.

The quote is:

> "'The policy positions [of the CPI] will be decided by the staff of the institute, through research, the advice of consumers and the input of sponsoring organizations.'"

Is that an accurate quote?

A I think I would have said it.

I can't tell you that I know that I did say it, and I was not contacted by the Washington Times for that quote. So I don't know the source of

the quote.

Q You agree that, at least in part, the policy positions of CPI are based on input from your sponsoring organizations, is that correct?

A Yes.

We can talk about how that works. But we certainly listen to lots of people.

I would list, by the way, carriers who are not our sponsors as well. I don't mean to omit that.

I've taken the opportunity while here at NARUC to meet with representatives from a lot of RBOCs, for example, talking about access charge reform, just to give an example.

So although that sentence is correct, I again would want to make sure that doesn't imply that that's the sole basis for positions we take.

Q This article goes on to say, quote,

"In other words, don't expect the Competitive Policy Institute to take the long distance industry to task even though AT&T, MCI and Sprint have established an oligopolistic pattern of raising their prices in lock-step,"

is that correct?

A It's correct that that's the quote, yes.

Q Since CPI has been formed, have you taken any public position or raised any concern regarding

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of October 1997, copies of the Reply of BellSouth Corporation in Support of its Petition for Reconsideration and Clarification were served by U.S. mail, first class, postage prepaid or hand delivery upon the following parties:

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